

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA

HAMMOND DIVISION

UNITED STATES OF AMERICA)	
)	
vs.)	CAUSE NO. 2:14cr56RLM
)	
KEVIN JOSEPH BABICH)	

SENTENCING MEMORANDUM

Kevin Babich owned and operated a business called Utility Communications, Inc., which entered into a contract with Vermont Transco to perform work on communications towers. Vermont Transco made advance payment of \$680,000 to Utility Communications with the understanding that the payment would be applied exclusively to the communication towers contract. Instead, Mr. Babich skimmed the payment to pay personal bills and other expenses. The contract work fell behind, and Vermont Transco wanted to hire a company not affiliated with Mr. Babich to complete the software work. Mr. Babich suggested a company called Digicom, which got the contract with VELCO. Mr. Babich didn't tell Vermont Transco that he was the sole owner of Digicom.

Mr. Babich has pleaded guilty to a 2-count information charging him with wire fraud, 18 U.S.C. § 1343, and mail fraud, 18 U.S.C. § 1341. The government had no objection to the presentence report. Mr. Babich objected to ¶¶ 14 (which recommends an order of restitution) and 84, 91 and 93 (which propose conditions of supervised release. The court adopts as its own findings

¶¶ 1-13 and 15-76 of the presentence report, specifically including paragraphs ¶¶ 39-51 concerning Mr. Babich's financial condition and earning ability.

A sentencing court must first compute the guidelines sentence correctly, then decide whether the guidelines sentence is the correct sentence for that defendant. United States v. Garcia, 754 F.3d 460, 483 (7th Cir. 2014). The court applies the 2014 version of the sentencing guidelines.

The counts of conviction are grouped together and treated as a single offense because the loss amount drives the offense levels for both crimes. U.S.S.G. § 3D1.2(b). The base offense level for wire fraud is 7. U.S.S.G. § 2B1.1(a). Mr. Babich's offense level is increased by 6 levels because the amount of loss (\$63,000) was more than \$30,000 but not more than \$70,000. U.S.S.G. § 2B1.1(b)(1)(D), then is reduced by 2 levels to reflect his clear acceptance of responsibility, U.S.S.G. § 3E1.1(a), producing a final adjusted offense level of 11. The sentencing guidelines assess 1 criminal history point for Mr. Babich's time served plus 30 day sentence in 2003 for failure to remit sales taxes, U.S.S.G. § 4A1.1(c), so the sentencing guidelines assign him to criminal history category I.

The guidelines recommend a sentencing range of 8 to 14 months for Mr. Babich, U.S.S.G. § 5A, and consider a sentence of probation as falling within that range if it includes a period of at least 8 months on home detention or some form of intermittent or community confinement. U.S.S.G. § 5C1.1(e).

The court decides the sentence under 18 U.S.C. § 3553, United States v. Booker, 543 U.S. 220 (2005). Accordingly, the court turns to the statutory factors, seeking a reasonable sentence: one sufficient, but not greater than necessary, to satisfy the purposes of the sentencing statute. 18 U.S.C. § 3553(a).

The guideline range is the starting point and the initial benchmark, but the court doesn't presume that the recommended range is reasonable. Gall v. United States, 552 U.S. 38, 50 (2007). As just calculated, the sentencing guidelines, which ordinarily pose the best hope, on a national basis, for avoiding unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct, 18 U.S.C. § 3553(a)(6); United States v. Boscarino, 437 F.3d 634, 638 (7th Cir. 2006), recommend an effective sentencing range of probation (with at least 8 months of home detention) to 14 months. The government recommends an 8-month sentence. The defense recommends a sentence of probation.

Mr. Babich defrauded Vermont Transco at two different points in the course of his relationship with Vermont Transco. Arbitration ensued, though the court can't tell how much of the need for arbitration flowed from his performance as opposed to his fraud. In mitigation, Mr. Babich's guilty pleas to an information spared the government the time and expense of indictment, trial and trial preparation.

Mr. Babich 38 years old. His employment record is good and he has no significant history of substance abuse. Mr. Babich has about 2 years of college under his belt and is healthy. He is in a long term relationship and is helping raise his girl friend's daughter. This is his first felony conviction and second criminal conviction overall. People close to Mr. Babich have written the court, attesting to his skills as an engineer and — somewhat surprisingly in a fraud case — his honesty and integrity. Those writers also point out that Mr. Babich's current business has several employees who would lose their jobs if he were imprisoned. The government believes that Mr. Babich's current financial condition, which isn't what one would hope for a 38-year-old entrepreneur, reflects "his living on [others'] money, or making commitments in exchange for things of value, but failing to keep those commitments."

Mr. Babich is a 38-year-old first-time felon, well-educated, with a good employment record and virtually no substance abuse history. He poses a significantly lower risk of future criminal activity than most federal criminal defendants.

The sentencing guidelines ordinarily are the best measurement of the need to reflect the crime's seriousness, to provide just punishment for the crime, and to deter others from committing the same sort of crimes. This case presents no better way of evaluating those factors. Reasonably uniform sentencing practices generally tend to promote respect for the law.

The government's requested 8-month sentence is greater than is necessary to satisfy the purposes of sentencing in 18 U.S.C. § 3553(a). Mr. Babich poses an exceedingly low risk of future criminal conduct and is being sentenced for crimes that took place nearly 5 years ago. On the other hand, Mr. Babich's requested sentence of straight probation isn't sufficient to satisfy the purposes of sentencing in light of Mr. Babich's having defrauded the same victim twice. Probation, with an 8-month term of home detention as recommended by the guidelines, is sufficient but not greater than necessary to satisfy the statutory purposes of sentencing. A longer term of probation than the one year Mr. Babich requests is needed to reflect the seriousness of his crimes. For all these reasons, the court concludes that an 18-month term of probation, with the first 8 months on home detention, is reasonable.

Mr. Babich presents an unusual set of facts that make a restitution order improper: his victim has been repaid the full amount of loss that it can claim. The contracts between Mr. Babich — as Utility Communications and as Digicom — and Vermont Transco contained arbitration clauses. The arbitrator awarded Vermont Transco the full amount the money that had been placed in escrow (a sum much greater than is recommended as restitution here) and ruled that Vermont Transco had waived any claim to anything else under the contract. Nothing in 18 U.S.C. § 3663 or § 3663A requires, or even justifies, an award of restitution to a victim who is estopped from accepting anything more.

If no restitution is required, several of the recommended supervision conditions — those in paras 91-93 and 95-96 of the presentence report — fall by the wayside, rendering moot Mr. Babich's objections to ¶¶ 91 and 93. Mr. Babich also objects to the restriction on travel in ¶ 84 of the presentence report. That proposed condition forbids travel outside this judicial district without permission of the probation officer, who can only deny permission if the travel would significantly hinder Mr. Babich's rehabilitation. Mr. Babich complains that his business takes to him places throughout the United States and beyond, so this condition would be burdensome: Mr. Babich proposes that his obligation to seek permission be limited to international travel.

Obtaining the probation officer's permission for travel beyond the district will be burdensome, but probation should be, to one extent or another, an inconvenience: it's the price the defendant is paying to society for breaking its laws. In Gall v. United States, 552 U.S. 38, 48-49 (2007), the Court explained that probationers are expected to suffer substantial restrictions on their liberty — including, in Mr. Gall's case, not being allowed to leave the judicial district. Mr. Babich committed two serious crimes. This limitation on his freedom of travel (far less of a restriction than most federal criminal defendants suffer) is part of a reasonable sentence for his wrongdoing.

Mr. Babich can't pay the fines recommended by the guidelines even if afforded the most generous of installment payment schedules, so the court

imposes no fine. A special assessment of \$200.00 is mandatory. 18 U.S.C. § 3013.

Accordingly, it is the judgment of the court that the defendant, Kevin Joseph Babich, is hereby placed on probation for a term of 18 months. While on probation, the defendant shall comply with the terms of supervision set forth in ¶¶ 77-89 and 94 of the presentence report, which paragraphs the court incorporates as part of this sentence, and further shall be placed on home detention for a period of 8 months. During that time, he shall remain at his place of residence except for employment and other activities approved in advance by the probation office. The defendant shall wear an electronic device and shall observe the rules specified by the Probation Department. The defendant shall pay all or part of the costs for participation in the program, not to exceed the sliding fee scale as established by the Department of Health and Human Services and adopted by this court, though failure to pay these fees shall not be grounds for imprisonment unless the failure is wilful.

Because the defendant is not able and, even with the use of a reasonable installment schedule, is not likely to become able to pay all or part of the fine recommended by the sentencing guidelines, the court imposes no fine.

The defendant shall pay to the United States a special assessment of \$200.00, which shall be due immediately.

ENTERED: February 23, 2015

/s/ Robert L. Miller, Jr.
Robert L. Miller, Jr., Judge
United States District Court

cc: K. Babich
L. Mackey, M. Stuaan
R. Stewart
USM
USPO